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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67225; File No. SR-ISE-2012-22)

June 20, 2012

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change, as Modified by Amendment No. 1, to Add an Index Option Product for Trading on the Exchange

I. Introduction

On March 9, 2012, the International Securities Exchange, LLC (“Exchange” or “ISE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade options on the ISE Max SPY Index (“ISE Max SPY”). The proposed rule change was published for comment in the Federal Register on March 22, 2012.<sup>3</sup> The Commission received three comment letters on the proposed rule change.<sup>4</sup> On May 1, 2012, the Commission extended the time period for Commission action to June 20, 2012.<sup>5</sup> On May 4, 2012, ISE submitted a response to the comment letters<sup>6</sup> and filed Amendment

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 66614 (March 16, 2012), 77 FR 16883 (“Notice”).

<sup>4</sup> See letters to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, EVP & Corporate Secretary, NYSE Euronext, dated April 2, 2012 (“NYSE Letter”); Kenneth M. Vittor, Executive Vice President and General Counsel, McGraw-Hill Companies, Inc., dated April 11, 2012 (“McGraw-Hill Letter I”); and Edward T. Tilly, President and Chief Operating Officer, Chicago Board Options Exchange, Incorporated (“CBOE”), dated April 13, 2012 (“CBOE Letter I”).

<sup>5</sup> See Securities Exchange Act Release No. 66889 (May 1, 2012), 77 FR 26812 (May 7, 2012).

<sup>6</sup> See letter to Elizabeth M. Murphy, Secretary, Commission, from Michael J. Simon, Secretary and General Counsel, ISE, dated May 4, 2012 (“ISE Response Letter I”).

No. 1 to the proposed rule change.<sup>7</sup> The Commission subsequently received three additional comment letters<sup>8</sup> and a second response letter from ISE.<sup>9</sup> All the comment letters received, including ISE's response letters, are available on the Commission's website.<sup>10</sup>

This order institutes proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1. Institution of these proceedings, however, does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as addressed below, the Commission desires to solicit additional input from interested parties on the issues presented by the proposed rule change.

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<sup>7</sup> Amendment No. 1 replaced the sentence: "Additionally, the proposed rule change would provide Members and investors with additional opportunities to trade S&P 500® options with a p.m.-settlement feature in an exchange environment and subject to transparent exchange-based rules, and that investors would also benefit from the opportunity to trade in association with this product on Expiration Fridays thereby removing impediments to a free and open market consistent with the Act." with the sentence: "Additionally, the proposed rule change would provide Members and investors with additional opportunities to trade options on a product that provides exposure to the share prices of SPY with a p.m.-settlement feature in an exchange environment and subject to transparent exchange-based rules, and that investors would also benefit from the opportunity to trade in association with this product on expiration Fridays thereby removing impediments to a free and open market consistent with the Act." According to ISE, the purpose of the amendment is to correct an erroneous sentence in the Statutory Basis section that could be misinterpreted. See Amendment No. 1.

<sup>8</sup> See letters to Elizabeth M. Murphy, Secretary, Commission, from Edward T. Tilly, President and Chief Operating Officer, CBOE, dated June 7, 2012 ("CBOE Letter II"); Kenneth M. Vittor, Executive Vice President and General Counsel, McGraw-Hill Companies, Inc., dated June 18, 2012 ("McGraw-Hill Letter II"); and from Edward T. Tilly, President and Chief Operating Officer, CBOE, dated June 19, 2012 ("CBOE Letter III").

<sup>9</sup> See letter to Elizabeth M. Murphy, Secretary, Commission, from Michael J. Simon, Secretary and General Counsel, ISE, dated June 15, 2012 ("ISE Response Letter II").

<sup>10</sup> The comment letters are available at <http://sec.gov/comments/sr-ise-2012-22/ise201222.shtml>.

## II. Description of the Proposal

As set forth in more detail in the Notice, ISE proposes to list and trade options, including long-term options, on the ISE Max SPY Index, which is “designed to represent 10 times the value of the published share prices in the SPDR S&P 500 ETF [(“SPY”)] Trust.”<sup>11</sup> Options on the ISE Max SPY Index would be European-style and p.m. cash-settled, and they would be quoted and traded in U.S. dollars.

According to ISE, the real-time value of the ISE Max SPY Index is calculated by multiplying the share prices of SPY by a factor of ten and rounding to the tenth place. This value would be calculated by ISE or its agent, and would be disseminated by ISE every 15 seconds during its regular trading hours to market information vendors via the Options Price Reporting Authority.<sup>12</sup>

ISE proposes to calculate the settlement value for options on the ISE Max SPY Index using the net asset value (“NAV”) of the fund, as calculated by ISE, on a per share basis, times ten. ISE states that the method it will use for calculating the NAV of SPY is the same method that is used industry-wide for calculating the NAV of an exchange traded fund (“ETF”) with equity-only holdings, and is the per-share dollar amount of the fund, which is calculated by dividing the total value of all the securities in its portfolio, less any liabilities, by the number of fund shares outstanding.<sup>13</sup> ISE also states that the settlement value that it calculates may be

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<sup>11</sup> ISE states that SPY is based on the S&P 500, which is a capitalization-weighted index of 500 stocks from a broad range of industries.

<sup>12</sup> ISE states that it also would disseminate these values to its members.

<sup>13</sup> See Notice, supra note 3 and ISE Response Letter II, supra note 9, at 3. In its second response letter, ISE sets forth its formula for calculating the index settlement value:  $I_{sett(t)} = NAV_{SPY(t)} \times 10$ . See ISE Response Letter II, supra note 9, at 2-3. In this formula, “ $I_{sett(t)}$ ” is the ISE Max SPY settlement value at time (t), “ $NAV_{SPY(t)}$ ” is the NAV

different from the NAV published by the trustee of the SPY trust.<sup>14</sup> In calculating the settlement value for options on the ISE Max SPY Index, ISE states that it would use the published closing prices from the primary market of the SPY trust's portfolio securities.<sup>15</sup>

As proposed, Exchange rules that are applicable to the trading of options on broad-based indexes would apply to the trading of options on the ISE Max SPY Index.<sup>16</sup> Specifically, the trading of options on the ISE Max SPY Index would be subject to, among others, Exchange rules governing margin requirements and trading halt procedures for index options. The trading of

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per share of the SPY trust at time (t) as calculated by ISE, and "M" is the constant multiplier of 10. See id. ISE also provides the formula for calculating NAV<sub>SPY(t)</sub>:

$$NAV_{SPY(t)} = \frac{\sum_{i=1}^n P_{(i)} \times S_{(i)} + Cash}{Shares\ Outstanding} \times \left[ 1 - \frac{Fee}{365} \right]$$

See id. In this formula, "n" is the number of stocks held by the trust, "P<sub>(i)</sub>" is the closing price of each stock held by the trust, "S<sub>(i)</sub>" is the number of shares of each stock held by the trust, "Cash" is the cash held in the trust, "Fee" is the stated fee for the trust, and "Shares Outstanding" is the number of trust shares outstanding. See id. ISE also states that "the net cash amount is determined by adding the accrued dividends of the portfolio securities since the fund's last distribution minus the accrued fees, which are essentially the annual management fees prorated per day." See id. at 3.

<sup>14</sup> ISE explains in its response letters that this difference may result because the trust may independently decide which exchange it deems to be the "primary market" as a source of closing prices, and the trustee reserves the right to evaluate portfolio securities independently of closing sale prices if it deems such prices to be "inappropriate." See ISE Response Letter I, supra note 6, at 6-7 and ISE Response Letter II, supra note 9, at 3. See also infra Section III.B.2.ii.

<sup>15</sup> In its response letters, ISE provides additional clarification regarding its calculation of the NAV of SPY, and its rationale for the difference between the calculation of the settlement value for the proposed options and the value for the ISE Max SPY Index itself. See infra Section III.B.2.

<sup>16</sup> See ISE Rules 2000 through 2013.

options on the ISE Max SPY Index also would be subject to the Exchange's customer protection rules.<sup>17</sup>

ISE proposes that options on the ISE Max SPY Index be approved on a pilot basis for an initial period of 14 months. ISE states that if it were to propose an extension of the program or propose to make the program permanent, then it would submit a filing proposing such amendments to the program. ISE notes that any positions established under the pilot would not be impacted by the expiration of the pilot.<sup>18</sup> As part of the pilot program, ISE would submit a pilot program report to the Commission at least two months prior to the expiration date of the program ("annual report"). The annual report would contain an analysis of volume, open interest and trading patterns. The analysis would examine trading in the proposed option product as well as trading in the securities that comprise the S&P 500 index. In addition, for series that exceed certain minimum open interest parameters, the annual report would provide analysis of index price volatility and share trading activity. In addition to the annual report, ISE committed to provide the Commission with periodic interim reports while the pilot is in effect that would contain some, but not all, of the information contained in the annual report. In its filing, ISE notes that it would provide the annual and interim reports to the Commission on a confidential basis.

### III. Comment Letters

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<sup>17</sup> See ISE Rules 608-612 and 616.

<sup>18</sup> As an example, ISE states in the Notice that a position in a series that expires beyond the conclusion of the pilot period could be established during the 14-month pilot. If the pilot program were not extended, then the position could continue to exist. However, any further trading in the series would be restricted to transactions where at least one side of the trade is a closing transaction. See Notice, supra note 3.

As noted above, the Commission received six comment letters and two ISE response letters on the proposed rule change.<sup>19</sup>

One commenter expresses support for the proposed rule change and states that it “generally applaud[s] efforts to provide investors with additional opportunities to invest using listed options.”<sup>20</sup> In particular, this commenter supports ISE’s proposal to allow p.m. settlement for options on the ISE Max SPY Index.<sup>21</sup> This commenter also supports the proposal to impose no position limits for options on the ISE Max SPY Index.<sup>22</sup> This commenter states that a key part of its basis for agreeing with the proposed position limits is the fact that “there is a very large degree of economic equivalence between options on [ISE’s] proposed index and the existing C2 SPXPM product.”<sup>23</sup>

Two commenters oppose the proposed rule change for the reasons discussed below.

A. Pending Litigation; Potential for Market Disruption and Harm to Investors

Two commenters argue that the proposed options are, in fact, options on the S&P 500 index and therefore would violate a permanent injunction entered by the Illinois state court in 2010 (“Injunction”).<sup>24</sup> These two commenters have filed a motion to enforce this Injunction

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<sup>19</sup> See supra notes 4, 6, 8, and 9.

<sup>20</sup> See NYSE Letter, supra note 4, at 1.

<sup>21</sup> See id. at 1-2.

<sup>22</sup> See id. at 2.

<sup>23</sup> See id.

<sup>24</sup> See CBOE Letter I and McGraw-Hill Letter I, supra note 4. According to one commenter, “the ISE rule filing itself violates the Injunction because the Injunction prohibits ISE from listing options on the S&P 500 Index and the submission and notification of the rule filing commences the process of listing such options.” See CBOE Letter I, supra note 4, at 2. Another commenter states that ISE’s planned unauthorized use of the S&P 500 index constitutes an unlawful violation of Standard & Poor’s

against ISE in Illinois Circuit Court,<sup>25</sup> and request that the Commission disapprove the proposed rule change<sup>26</sup> or not take action to approve the proposed rule change until the litigation is resolved.<sup>27</sup> In a second comment letter, CBOE argues that the Commission should disapprove the proposed options because they could not legally be traded.<sup>28</sup> In addition, CBOE requests that if the Commission considers the proposed rule change prior to judicial action on the motion, the Commission should make clear that any approval is solely concerned with whether the proposed rule change is consistent with the Act, and that the Illinois state court has full and independent authority to resolve the issues that arise under state law.<sup>29</sup>

In its response letter, ISE states that it is opposing the motion to enforce the Injunction.<sup>30</sup> ISE objects to the commenters' request that the Commission delay approval of the proposed rule change until the Illinois court decides on the motion, referring to prior Commission action where

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Financial Services LLC's ("S&P") intellectual property rights. See McGraw-Hill Letter I, supra note 4, at 1 and 4. This commenter urges the Commission to not approve the listing and trading of products that have previously been determined to be unlawful. See id. at 4. In subsequent comment letters, commenters note that the Illinois Appellate Court recently affirmed the lower court's Injunction. See CBOE Letter II, supra note 8, at 6 and McGraw-Hill Letter II, supra note 8, at 1.

<sup>25</sup> See Attachment 1 to CBOE Letter I and Attachment to McGraw-Hill Letter I, supra note 4.

<sup>26</sup> See CBOE Letter I, supra note 4, at 2 and McGraw-Hill Letter I, supra note 4, at 1.

<sup>27</sup> See CBOE Letter I, supra note 4, at 2.

<sup>28</sup> See CBOE Letter II, supra note 8, at 7.

<sup>29</sup> See CBOE Letter I, supra note 4, at 2. See also CBOE Letter II, supra note 8, at 8.

<sup>30</sup> See ISE Response Letter I, supra note 6, at 2. ISE states that the commenters' primary basis for claiming that the proposed options are options on the S&P 500 index is "a single, erroneous sentence contained in ISE's 50 page rule filing" and that this sentence "is contained in the basis section of ISE's rule filing, which section is not controlling in terms of the description of the product." See id. at 3. ISE subsequently amended this sentence in Amendment No. 1. See supra note 7.

the Commission indicated that its decision to approve a rule filing should be based solely on whether it complies with the Act, without regard to any state law issues.<sup>31</sup> ISE states that because the current Illinois proceedings involve issues of intellectual property law and state procedure, the Commission should approve this proposed rule change without regard to the Illinois proceedings.<sup>32</sup>

According to the two commenters, significant market disruption and harm to investors could occur if the Commission were to approve the proposed rule change prior to the Illinois court ruling on whether the proposed options violate the existing Injunction or are otherwise unlawful.<sup>33</sup> Specifically, these commenters express the concern that if ISE commences trading in the proposed options before a decision by the Illinois court where the court finds that such trading is unlawful, investors would have no readily available means to trade out of or exercise their positions in the proposed options.<sup>34</sup>

In its first response letter, ISE disagrees with the comment that the Commission's approval of the proposed rule change before the Illinois court's ruling on the motion could result in significant market disruption or harm to investors.<sup>35</sup> Nevertheless, ISE represents that, absent returning to the Commission and seeking explicit approval to do so, it will not commence trading options on the ISE Max SPY Index until the Illinois Circuit Court has ruled on the motion.<sup>36</sup>

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<sup>31</sup> See ISE Response Letter I, supra note 6, at 2-3.

<sup>32</sup> See id. at 3.

<sup>33</sup> See CBOE Letter I, supra note 4, at 2 and McGraw-Hill Letter I, supra note 4, at 1 and 4.

<sup>34</sup> See CBOE Letter I, supra note 4, at 2 and McGraw-Hill Letter I, supra note 4, at 1 and 4.

<sup>35</sup> See ISE Response Letter I, supra note 6, at 4.

<sup>36</sup> See id.



In a second comment letter, CBOE reiterates its concerns regarding potential market disruption and harm to investors.<sup>37</sup> In response to ISE's letter, CBOE states that the Illinois lower court's ruling on the motion to enforce the Injunction may not be the end of the litigation over whether the proposed options may be validly traded under state law, and that the Commission should condition any approval on ISE's undertaking not to commence trading until all judicial challenges to the lawfulness of the proposed options under state law have been resolved.<sup>38</sup>

In its second response letter, ISE again represents that it will not launch the proposed options for trading unless and until the Illinois Circuit Court denies the motion to enforce the Injunction.<sup>39</sup> In addition, in the event that the Illinois Circuit Court were to deny the motion to enforce the Injunction, and such a decision was to be subsequently reversed and ISE were to be enjoined from offering the proposed options after it had commenced trading and there is open interest, ISE represents that it would seek to have the state court permit it to continue to offer a market for closing-only transactions for so long as it takes all open interest to wind down in an orderly manner.<sup>40</sup> ISE states that it has systems, rules, and procedures in place that would permit such a closing-only orderly wind down, and that it is "inconceivable that the Court would refuse

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<sup>37</sup> See CBOE Letter II, supra note 8, at 7. The commenter states that by exposing investors to these undisclosed risks, the proposal fails to protect investors and the public interest. See id. See also McGraw-Hill Letter II, supra note 8, at 2-3 (stating that it would be inappropriate and contrary to the public interest for the Commission to approve a product that has been enjoined and is the subject of ongoing litigation to enforce the Injunction).

<sup>38</sup> See CBOE Letter II, supra note 8, at 8.

<sup>39</sup> See ISE Response Letter II, supra note 9, at 4.

<sup>40</sup> See id.

to permit such a closing-only market.”<sup>41</sup> ISE further states that even if the court were to deny a closing-only market, there are adequate rules and procedures in place, at the exchange and the clearing level, to allow for an orderly wind down of any open interest.<sup>42</sup> In addition, ISE represents that it will insert a litigation risk discussion into the Options Disclosure Document (“ODD”),<sup>43</sup> which will be substantially similar to the litigation risk language included in prior versions of the ODD with respect to index participation products.<sup>44</sup> Finally, ISE states that these investor protection risks are not unique to the proposed product, and that there have been multiple cases where a market becomes unavailable for the continued trading of a product in which there is open interest.<sup>45</sup>

B. Potential for Investor Confusion

1. Characterization of the Product as Options on the ISE Max SPY Index

One commenter asserts that ISE’s description of the proposed options is inaccurate and misleading.<sup>46</sup> This commenter understands from the filing that the settlement value for options

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<sup>41</sup> See id.

<sup>42</sup> See id. As an example, ISE points out that the Options Clearing Corporation (“OCC”) has by-laws and rules that, in the case of index options, permit it to create and use a replacement index to close out the open interest. See id.

<sup>43</sup> The ODD explains the characteristics and risks of exchange-traded options. Rule 9b-1 under the Act requires, among other things, that broker-dealers furnish the ODD to a customer before accepting an order from the customer to purchase or sell an option contract relating to an options class that is the subject of the ODD, or approve the customer’s account for the trading of such option. See 17 CFR 240.9b-1(d).

<sup>44</sup> See ISE Response Letter II, supra note 9, at 4-5.

<sup>45</sup> See id. at 5. ISE gives an example of a listed company declaring bankruptcy, where all options markets have delisted options on the stock and there was no available market to close existing open interest. See id. ISE states that in these instances, investors with open positions waited until expiration and were either assigned or not, according to OCC rules and procedures. See id.

<sup>46</sup> See CBOE Letter I, supra note 4, at 4.

on the ISE Max SPY Index would be calculated differently from all other values of the ISE Max SPY Index, stating that “the settlement value will be calculated by reference to the stocks in the S&P 500 Index as weighted by S&P in its S&P 500 Index.”<sup>47</sup> This commenter argues that the benchmark for the proposed option is not SPY, because the proposed options are not actually settled by reference to SPY.<sup>48</sup> This commenter subsequently asserts that the proposed rule change “misleads investors by falsely characterizing the Proposed Options as options on the ISE Max SPY Index.”<sup>49</sup> Specifically, this commenter states that ISE has admitted that the proposed options would not be settled based on the value of SPY and has failed to set forth any way in which the settlement value for the proposed options would have any relation to the ISE Max SPY Index.<sup>50</sup> This commenter also asserts that the proposed rule change misleads investors by characterizing the proposed option as a broad-based index option, when the ISE Max SPY Index actually consists of only a single component security.<sup>51</sup>

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<sup>47</sup> See id. See also McGraw-Hill Letter I, supra note 4, at 3.

<sup>48</sup> See CBOE Letter I, supra note 4, at 4. According to the commenter, this point is further illustrated by ISE’s proposal with respect to position limits for the options on the ISE Max SPY Index. See id. at 5. The commenter points out that ISE proposed no position limits for these options by reference to the position limits for the p.m.-settled S&P 500 index (“SPXPM”) options, rather than the position limits for other SPY-based products. See id. Another commenter states that the Commission should be concerned by the misleading disconnect between the name of the proposed options and the manner in which the options would be settled. See also McGraw-Hill Letter I, supra note 4, at 2-3 and note 5.

<sup>49</sup> See CBOE Letter II, supra note 8, at 2.

<sup>50</sup> See id. Another commenter also reiterates, in its second comment letter, that the proposed options would not be settled based on any value of the ISE Max SPY Index, but rather based on ISE’s recalculation of the S&P 500 index, using the same stocks selected by S&P and the same weighting methodology. See McGraw-Hill Letter II, supra note 8, at 2.

<sup>51</sup> See CBOE Letter II, supra note 8, at 4.

In response, ISE states that the rule filing makes clear that the ISE Max SPY Index is calculated based on the traded prices of SPY shares, and that the options on the ISE Max SPY Index are settled on the basis of a calculation of the NAV of the SPY trust's assets.<sup>52</sup> Further, to ensure that investors have an ongoing means to access information about options on the ISE Max SPY Index, ISE represents, in its second response letter, that it will: (i) work with the OCC to amend the ODD to provide a clear and unambiguous description of the product and any unique risks associated with it; (ii) display the contract specifications on its website; (iii) create a special web page devoted exclusively to the proposed options, which will describe in plain English all the terms of this product, including index calculation and settlement; and (iv) follow the same marketing process it follows for all of its other new products, which is designed to promote awareness and a clear understanding of the product.<sup>53</sup>

Further, according to one commenter, to the extent that the "ISE Max SPY Index" is "index-like," it is only because the SPY trust holds all of the stocks in the S&P 500 index, weighted as the stocks in the S&P 500 index are weighted.<sup>54</sup> This commenter argues that even if the benchmark could be said to have reference to SPY, the benchmark would have only one component security and therefore would not be an index.<sup>55</sup> ISE states in response that an index

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<sup>52</sup> See ISE Response Letter I, supra note 6, at 3.

<sup>53</sup> See ISE Response Letter II, supra note 9, at 2.

<sup>54</sup> See CBOE Letter I, supra note 4, at 5.

<sup>55</sup> See id. at 4 and CBOE Letter II, supra note 8, at 4-6. CBOE states that "allowing options to trade on a security index comprised of a single component would implicate potentially far-reaching regulatory considerations under the Exchange Act. If the concept of a 'security index option' is that elastic, then options on a single equity stock could just as easily be traded as a security index option, through the fiction of creating a reference point to that single stock's prices. That has never before been contemplated, and should not be permitted – at least without deep regulatory examination of the implications of that

with one component is still an index and refers to CBOE's micro narrow-based index options and CBOE's indexes that measure the spot yield of individual U.S. Treasury Securities by simply multiplying them by ten (i.e., TNX).<sup>56</sup> In its second letter, CBOE states that, consistent with Section 3 of the Act<sup>57</sup> and the principles set forth in Commission's staff legal bulletin, micro narrow-based indexes may consist of no fewer than two securities and no more than nine securities.<sup>58</sup> CBOE also states that its micro narrow-based index option rule applies only to an underlying benchmark that is itself a security index.<sup>59</sup> With respect to ISE's reference to CBOE's indexes that measure the spot yield of individual U.S. Treasury Securities, CBOE states that "TNX options were not security index options, but instead were interest rate options based on interest rate values that were 'indexed' to make the options contracts a suitable size."<sup>60</sup> CBOE further states that TNX options were regulated as interest rate options and were described for all purposes as interest rate options.<sup>61</sup>

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development." See CBOE Letter II, supra note 8, at 6. See also McGraw-Hill Letter I, supra note 4, at note 3.

<sup>56</sup> See ISE Response Letter I, supra note 6, at 7-8.

<sup>57</sup> In this regard, CBOE points out that the definition of "security future" in Section 3 of the Act makes a distinction between a "narrow-based security index" and a "single security." See CBOE Letter II, supra note 8, at 5.

<sup>58</sup> See id. at 4-5.

<sup>59</sup> See id. at 5.

<sup>60</sup> See id. at 6. CBOE states that "[t]he term 'index' was used in referring to the reference value for the TNX in a manner distinct from the meaning of a 'security index'" and that the term "meant a number or a reference point, in the same sense that the word 'index' is used in the term 'consumer price index.'" See id.

<sup>61</sup> See id.

In response, ISE states that there is no legal requirement that an index consists of more than one component.<sup>62</sup> ISE disagrees with the commenter's rationale that indexes must contain at least two components, and states that the commenter is "backpedaling on its own past history of creating one-component indexes."<sup>63</sup>

2. Clarity and Completeness of the Description of the Options on the ISE Max SPY Index

i. Method for Calculating Settlement Values

One commenter states that ISE is unclear in describing the assets that it would take into account in calculating the settlement value of the proposed options, and points out the differences between ISE's calculation of the NAV of SPY, as described in the Notice, and the trust's calculation of the NAV of SPY.<sup>64</sup> In particular, this commenter points out that ISE omitted the reference to "other assets" of the trust in the description of its calculation methodology.<sup>65</sup> The commenter states that if ISE does not take the "other assets" held in the trust into account in calculating settlement values for the proposed options, its settlement value calculation methodology will "clearly diverge from the method used by the Trustee for the Trust to calculate NAVs for the Trust."<sup>66</sup> The commenter states that if this is ISE's intent, it needs to be clearly stated in the filing.<sup>67</sup>

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<sup>62</sup> See ISE Response Letter II, supra note 9, at 5.

<sup>63</sup> See id.

<sup>64</sup> See CBOE Letter I, supra note 4, at 5-6.

<sup>65</sup> See id. The commenter also states that the calculation of the values of the S&P 500 index, unlike the calculation of the NAV of SPY, does not take into account other assets such as dividends. See id. at 6.

<sup>66</sup> See id.

<sup>67</sup> See id.

In its response letter, ISE states that the ISE Max SPY Index “is settled by reference to the value of the SPY ETF” and that it is independently calculating the NAV of the SPY ETF using a methodology that closely tracks the methodology that State Street Global Advisors (“SSgA”) uses to calculate the NAV of the SPY ETF.<sup>68</sup> ISE states that generally, the NAV for equity-based ETFs is calculated in the same manner, regardless of who the calculation agent is.<sup>69</sup> ISE further explains that NAV is determined by adding the value of the portfolio securities to the trust’s net cash (accrued dividends minus accrued fees and expenses), and dividing the result by the total number of outstanding shares of the fund.<sup>70</sup> ISE states that the net cash amount is usually determined by the fund’s administrator, who provides that information to the National Securities Clearing Corporation (“NSCC”).<sup>71</sup>

In a second comment letter, CBOE reiterates that ISE fails to explain the differences between its calculation of the NAV and the NAV published by the trustee of the trust.<sup>72</sup> CBOE states that ISE’s proposal did not make clear that the settlement of the proposed options is based on a calculation of the NAV of the SPY ETF, and that the proposal misleads investors about how ISE would calculate the settlement value.<sup>73</sup> CBOE notes that “ISE states that the NAV calculation of an ETF ‘generally’ is determined by ‘adding the trust’s net cash (accrued dividends minus accrued fees and expenses)’ to the value of the portfolio securities,” thereby implying that it would do so as well when computing the settlement value of the proposed

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<sup>68</sup> See ISE Response Letter I, supra note 6, at 4.

<sup>69</sup> See id. at 6.

<sup>70</sup> See id.

<sup>71</sup> See id.

<sup>72</sup> See CBOE Letter II, supra note 8, at 4.

<sup>73</sup> See id. at 3-4.

options.<sup>74</sup> CBOE states, however, that “ISE is careful never to actually state – either in the ISE Proposal or [ISE Response Letter I] – that it would use dividends and Trust expenses when calculating the settlement value of the Proposed Options.”<sup>75</sup> CBOE further points out that ISE may not be able to include those factors in its calculation because the trust disseminates information about the SPY ETF’s net cash at the same time as the information about the value of its stock holdings.<sup>76</sup>

In a second response letter, ISE specifically sets forth the formula for settlement value calculation, including the formula for calculating the NAV of SPY.<sup>77</sup> ISE states that its NAV calculating method is the same standard method that is used industry-wide for ETFs with equity-only holdings.<sup>78</sup> Specifically, ISE explains that after the close of each trading day, the fund’s

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<sup>74</sup> See id. at 3.

<sup>75</sup> See id. Another commenter states, in a second comment letter, that “the Commission should not be misled by ISE’s oblique reference to the use of a ‘well known methodology that is intended to track, as closely as possible SSGA’s methodology for its calculation of the NAV for the SPY ETF’” because “[t]he ‘well-known methodology’ that ISE proposes to employ is to use S&P’s selection of stocks for inclusion in the S&P 500 and the manner in which those stocks are weighted by S&P for purposes of calculating the S&P 500, both of which are proprietary to S&P.” See McGraw-Hill Letter II, supra note 8, at 2.

<sup>76</sup> See CBOE Letter II, supra note 8, at 3-4. CBOE reiterates this comment in its third comment letter. See CBOE Letter III, supra note 8, at 1-2. In particular, CBOE questions the timing that the information necessary for ISE to make the settlement calculation would be made available. See id. In this regard, CBOE states that “the information on which ISE purportedly would rely to compute the NAV of the SPY ETF would not be available until hours after ISE’s admitted deadline.” See id. at 2. Accordingly, CBOE concludes that ISE’s proposal “continues to mislead investors about how the Proposed Options would settle.” See id. See also infra Section III.B.2.i (describing the calculating methodology for the settlement value of options on the ISE Max SPY Index).

<sup>77</sup> See ISE Response Letter II, supra note 9, at 2-3.

<sup>78</sup> See id. at 3.



administrator provides to the NSCC the portfolio securities of the fund, the number of shares of each security, the net cash of the fund, and the shares outstanding of the fund.<sup>79</sup> The NSCC makes this information available to market participants on a daily basis after the close of each trading day.<sup>80</sup> ISE states that, by way of its market data vendor, it will calculate the settlement value using the data received from the NSCC.<sup>81</sup>

ii. Source of Prices Used in Calculating Settlement Values

One commenter states that ISE is unclear in describing the sources of the prices that it would use in calculating settlement values for the proposed options and that ISE's representation of the trust's NAV calculation is inconsistent with the prospectus.<sup>82</sup> In its response letter, ISE states that the filing clearly identifies the source of the prices – the published closing prices from the primary market of the securities.<sup>83</sup> ISE also disagrees with the comment that its representation is inconsistent with the SPDR prospectus because the trust may independently decide which exchange it deems to be the “primary market” as a source for closing prices.<sup>84</sup> In a second response letter, ISE again states that its calculation of the NAV would be based upon the closing prices from the primary markets of each portfolio security, and that it recognizes that the

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<sup>79</sup> See id.

<sup>80</sup> See id.

<sup>81</sup> See id. ISE states that, unlike the trust's NAV calculation, investors will have certainty in knowing how the settlement value of ISE Max SPY options was calculated by ISE.  
See id.

<sup>82</sup> See CBOE Letter I, supra note 4, at 6-7.

<sup>83</sup> See ISE Response Letter I, supra note 6, at 6-7.

<sup>84</sup> See id. at 7.

SPY trust may use different prices because the trustee reserves the right to evaluate portfolio securities independently of closing sale prices if it deems such prices to be “inappropriate.”<sup>85</sup>

iii. Differences between Settlement Value and All Other Values

One commenter states that ISE’s filing “does not contain any explanation of why it proposes to calculate settlement values of the Proposed Benchmark differently from all other values of the Proposed Benchmark.”<sup>86</sup> In its response letter, ISE explains that it is doing so to decrease the opportunity for manipulation and other abusive trading practices.<sup>87</sup> Specifically, ISE states that a would-be manipulator would need to manipulate the closing price of 500 individual stocks, as opposed to the closing price of one ETF.<sup>88</sup> ISE also states that its calculation of the NAV would allow for a timely settlement of the proposed options.<sup>89</sup> Specifically, ISE states that the obligation of SSgA is to establish a NAV of the SPY ETF before

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<sup>85</sup> See ISE Response Letter II, supra note 9, at 3.

<sup>86</sup> See CBOE Letter I, supra note 4, at 7. The “Proposed Benchmark” refers to the ISE Max SPY Index. See id. at note 2. This commenter further states that “ISE’s plan to use the same prices to calculate settlement values that S&P uses to calculate the S&P 500 demonstrates that ISE’s true purpose is to replicate the value of the S&P 500 as closely as possible, even though doing so creates the possibility of discontinuities between the settlement values of the Proposed Benchmark and all other values of that benchmark.” See id. at 7. See also CBOE Letter II, supra note 8, at 3 (stating that ISE intends “to replicate European-style, p.m. settled S&P 500 index options” by “divorcing its Proposed Options from all connection to the ISE Max SPY Index value at the most important time – i.e., settlement – and by instead calculating the settlement value on the ‘closing prices of [the] 500 individual stocks’ in the S&P 500 index.”)

<sup>87</sup> See ISE Response Letter I, supra note 6, at 4. CBOE disagrees with ISE’s argument that its calculation methodology for the settlement of options on the ISE Max SPY Index would decrease manipulation because “the SPY ETF is one of the most actively traded securities in the investing world.” See CBOE Letter II, supra note 8, at 3.

<sup>88</sup> See ISE Response Letter I, supra note 6, at 5.

<sup>89</sup> See id. at 4. See also supra note 76 (discussing CBOE’s response to this comment in its third comment letter).

the next day's opening.<sup>90</sup> However, since the OCC requires settlement values to be sent to it the same day as the settlement of an option, ISE cannot rely on the SSgA-published NAV.<sup>91</sup>

Further, ISE points out that “the concept of utilizing a reference price to settle an index option product that differs from the values of the proposed benchmark is not novel, and is best illustrated in CBOE’s AM-settled S&P 500 index [(“SPX”)] options.”<sup>92</sup> In response, CBOE differentiates the settlement of SPX options from the settlement of ISE Max SPY options.<sup>93</sup> Specifically, CBOE states that SOQ<sup>94</sup> represents a modified calculation of the same interest that underlies SPX options during their life – the S&P 500 index.<sup>95</sup> Conversely, CBOE states that ISE would use a different underlying benchmark to calculate the settlement value of the proposed options – the benchmark during the life of the proposed options would be the ISE Max

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<sup>90</sup> See id. at 5.

<sup>91</sup> See id. at 5-6. In its second response letter, ISE reiterates that because the trustee is under no obligation to distribute the NAV before the next day's open, ISE will perform its own calculation of the NAV to ensure that the settlement value is transmitted to OCC in time for regular processing of expiring contracts (generally before 6 p.m. ET). See ISE Response Letter II, supra note 9, at 3-4.

<sup>92</sup> See ISE Response Letter I, supra note 6, at 4-5. Specifically, ISE states that SPX options use a settlement value calculation called the Special Opening Quotation (“SOQ”), and SOQ is a special calculation of the underlying index where the opening prices of the index components are used to determine the settlement value of options contracts. See id. at 5. According to ISE, because component stocks may open after the primary markets have opened, or not at all, this can result in a settlement value that has a significant discrepancy from the initial index quote. See id. ISE reiterates this point in its second response letter. See ISE Response Letter II, supra note 9, at 4.

<sup>93</sup> See CBOE Letter II, supra note 8, at 2.

<sup>94</sup> See supra note 92.

<sup>95</sup> See CBOE Letter II, supra note 8, at 2.

SPY Index (based on the traded prices of SPY), whereas the benchmark at settlement would be a recalculated S&P 500 index.<sup>96</sup>

iv. Special Dividends and Special Distributions

One commenter states that companies in the S&P 500 index from time to time pay special dividends and make special distributions to their shareholders, and ISE did not explain whether or how the relationship between settlement value and other values would be preserved in such a circumstance.<sup>97</sup>

In its response letter, ISE states that it has never been a practice of the exchanges to describe the details on dividend processing for components of indexes in rule filings seeking approval of index options.<sup>98</sup> Further, ISE states that because the proposed product is an index option, it does not anticipate adjustments being made to the options as a result of any component dividends, and that this is customary practice for index options.<sup>99</sup>

3. ODD Amendments

One commenter suggests that the ODD would require supplementation before the proposed options could be listed and traded.<sup>100</sup> First, this commenter states that an investor looking for disclosure with respect to the proposed product might be uncertain as to whether they are described in Chapter III (Options on Equity Securities) or Chapter IV (Index Options) of the

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<sup>96</sup> See id.

<sup>97</sup> See CBOE Letter I, supra note 4, at 7.

<sup>98</sup> See ISE Response Letter I, supra note 6, at 7.

<sup>99</sup> See id.

<sup>100</sup> See CBOE Letter I, supra note 4.

ODD.<sup>101</sup> Second, this commenter states that the ODD would need to be supplemented to provide disclosure with respect to the difference between the calculation of the settlement value and all other values of the proposed options.<sup>102</sup>

In its response letter, ISE states that it will follow the well-settled process for supplementing the ODD to devise disclosure of any risks associated with the proposed options that are determined by the Listed Options Disclosure Committee (“LODC”)<sup>103</sup> to be necessary for disclosure.<sup>104</sup> Further, as discussed above, in its second response letter, ISE represents that it will work with the OCC to amend the ODD to provide a clear and unambiguous description of the proposed options and any unique risks associated with it.<sup>105</sup>

IV. Proceedings to Determine Whether to Approve or Disapprove SR-ISE-2012-22, as Modified by Amendment No. 1, and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2) of the Act to determine whether the proposed rule change should be approved or disapproved.<sup>106</sup> Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of disapproval proceedings does not indicate that the

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<sup>101</sup> See id. at 7-8.

<sup>102</sup> See id. at 8-9.

<sup>103</sup> ISE states that the LODC is comprised of representatives of the OCC and each of the participant exchanges, and has the responsibility for determining and performing the necessary disclosure. See ISE Response Letter I, supra note 6, at 8.

<sup>104</sup> See id.

<sup>105</sup> See ISE Response Letter II, supra note 9, at 2.

<sup>106</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2)(B) of the Act provides that proceedings to determine whether to approve or disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to an additional 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or if the self-regulatory organization consents to the extension.

Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

As discussed above, the proposed rule change would allow ISE to list and trade European-style, p.m. and cash settled options on the ISE Max SPY Index. The proposed options would not be subject to position limits. The real-time value of the ISE Max SPY Index would be calculated by multiplying the share prices of SPY by a factor of ten and rounding to the tenth place, whereas the settlement value of the option would be based on the NAV of SPY, as calculated by ISE,<sup>107</sup> on a per share basis, times ten.

The section of the Act applicable to the proposed rule change that provides the grounds for the disapproval (or approval) under consideration is Section 6(b)(5),<sup>108</sup> which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

As discussed above, one commenter supports the proposed rule change,<sup>109</sup> while two commenters oppose the proposed rule change.<sup>110</sup> Commenters raise the concern that the proposed rule change could lead to significant market disruption and harm to investors if ISE

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<sup>107</sup> See supra note 13.

<sup>108</sup> 15 U.S.C. 78f(b)(5).

<sup>109</sup> See NYSE Letter, supra note 4.

<sup>110</sup> See CBOE Letter I, supra note 4; McGraw-Hill Letter I, supra note 4; CBOE Letter II, supra note 8; McGraw-Hill Letter II, supra note 8; and CBOE Letter III, supra note 8.

commences trading in the proposed options before all judicial challenges to the lawfulness of the proposed options under state law have been resolved.<sup>111</sup> In addition, commenters raise concerns regarding whether the proposed new product could be misleading to investors and questioned the accuracy and clarity of ISE's description of the proposed options, including the calculation of the settlement value,<sup>112</sup> the differences between the calculation of the settlement value and all other values of the ISE Max SPY Index,<sup>113</sup> and the characterization of the proposed options as options on the "ISE Max SPY Index."<sup>114</sup>

In light of the concerns raised by commenters, the Commission believes that questions remain as to whether the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act, including whether the proposed options are designed to protect investors and the public interest.

#### V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the issues identified above, as well as any others they may have identified with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there

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<sup>111</sup> See CBOE Letter I, supra note 4, at 2; McGraw-Hill Letter I, supra note 4, at 1 and 4; CBOE Letter II, supra note 8, at 6-8; and McGraw-Hill Letter II, supra note 8, at 2-3.

<sup>112</sup> See CBOE Letter I, supra note 4, at 5-7; CBOE Letter II, supra note 8, at 3-4; McGraw-Hill Letter II, supra note 8, at 2; and CBOE Letter III, supra note 8, at 1-2.

<sup>113</sup> See CBOE Letter I, supra note 4, at 7; McGraw-Hill Letter I, supra note 4, at 3; and CBOE Letter II, supra note 8, at 2-3.

<sup>114</sup> See CBOE Letter I, supra note 4, at 4-5; McGraw-Hill Letter I, supra note 4, at 2-4; CBOE Letter II, supra note 8, at 2-7; and McGraw-Hill Letter II, supra note 8, at 2.

do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>115</sup>

Interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 45 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 60 days from publication in the Federal Register].

The Commission is asking that commenters address the merit of ISE's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Specifically, the Commission is requesting comment on the following:

- What are commenters' views as to whether market disruption and harm to investors would occur if the Commission were to approve the proposed rule change before all judicial challenges to the lawfulness of the proposed options under state law have been resolved? In light of the Exchange's representation that it would not start trading the proposed options until the Illinois Circuit Court rules on the motion to enforce the Injunction, and its representation regarding the potential mechanisms to ensure an orderly wind down of trading in the event that ISE is enjoined from offering the product after

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<sup>115</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).



trading has already begun, do commenters believe any harm would result if the Exchange started trading the proposed options before all judicial challenges to the lawfulness of the proposed options under state law have been resolved? Why or why not?

- As outlined above, the Exchange has provided additional detail about how it intends to calculate the settlement value for options on the ISE Max SPY Index.<sup>116</sup> What are commenters' views as to whether the Exchange should provide additional clarity in the filing regarding the calculation methodology for the settlement value of options on the ISE Max SPY Index to mitigate concerns regarding the potential for investor confusion? Please be specific in your response.
- As noted above, the Exchange would calculate the value of the ISE Max SPY Index by reference to the traded prices of SPY, times ten, at all times. However, the settlement value of the options on the ISE Max SPY Index would be calculated by reference to the NAV of SPY, as calculated by the Exchange, on a per share basis, times ten.<sup>117</sup> What are commenters' views of the impact, if any, of the differences between the calculation of the settlement value of the proposed options and the value of the ISE Max SPY Index itself on investor understanding of the options on the ISE Max SPY Index? Do commenters believe that the differences between the calculation of the settlement value of the proposed options and the value of the ISE Max SPY Index itself could cause investor confusion? Please explain why or why not.

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<sup>116</sup> See supra Section III.B.2.i. and note 13.

<sup>117</sup> See supra Section III.B.2.i. and note 13.

- If commenters believe that the differences between the calculation of the settlement value of the proposed options and the value of the ISE Max SPY Index itself could cause investor confusion, what are commenters' views as to whether the steps that ISE has proposed to take to provide investors with information about the product<sup>118</sup> would be sufficient to mitigate such concerns?
- Do commenters believe that the characterization of the proposed options as options on the "ISE Max SPY Index" would have the potential to cause investor confusion? If so, why? If not, why not? If so, what are commenters' views on whether any potential confusion would be sufficiently mitigated by the steps that ISE has proposed to take to provide investors with information about the product?<sup>119</sup> Please be specific in your response.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2012-22 on the subject line.

Paper Comments:

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<sup>118</sup> As stated above, in its second response letter, ISE represents that it will: (i) work with the OCC to amend the ODD to provide a clear and unambiguous description of the product and any unique risks associated with it; (ii) display the contract specifications on its website; (iii) create a special web page devoted exclusively to the proposed options, which will describe in plain English all the terms of this product, including index calculation and settlement; and (iv) follow the same marketing process it follows for all of its other new products, which is designed to promote awareness and a clear understanding of the product. See ISE Response Letter II, supra note 9, at 2.

<sup>119</sup> See id.

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2012-22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should

submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2012-22 and should be submitted on or before [insert date 45 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 60 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>120</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>120</sup> 17 CFR 200.30-3(a)(57).